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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-857

EVCO, a New Mexico Corporation, d/b/a INSTRUCTIONAL DESIGNS, *Petitioner*,

v.

FRANKLIN JONES, Commissioner of the Bureau of Revenue of the State of New Mexico and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, *Respondents*.

On Writ of Certiorari to the Court of Appeals of the State of New Mexico

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

STATUTES AND REGULATIONS INVOLVED

In addition to the statutory provisions and regulations cited by Petitioner, Respondents consider the following statutory provisions and regulations are involved in this case: Section I of the Fourteenth Amendment to the United States Constitution; § 72-16-4.3, subparagraph C, N.M.S.A. 1953 of the Emer-

gency School Tax Act [N.M. Laws of 1963, chapter 325, § 2]; § 72-16-4.9, N.M.S.A. 1953 of the Emergency School Tax Act [N.M. Laws of 1963, chapter 325, § 7]; § 72-16-5, N.M.S.A. 1953 of the Emergency School Tax Act [N.M. Laws of 1963, chapter 239, § 1 and N.M. Laws of 1966, chapter 59, § 1]; § 72-16A-3, subparagraph E of the Gross Receipts and Compensating Tax Act, effective July 1, 1967; § 72-16A-3, subparagraph F, of the Gross Receipts and Compensating Tax Act, effective July 1, 1967; § 72-16A-3, subparagraph J of the Gross Receipts and Compensating Tax Act, effective July 1, 1967; § 72-16A-14, subparagraph G of the Gross Receipts and Compensating Tax Act, effective July 1, 1967; § 72-16A-14, subparagraph L, of the Gross Receipts and Compensating Tax Act, effective July 1, 1967; § 72-16A-14.12, N.M.S.A. 1953 (Supp. 1971) of the Gross Receipts and Compensating Tax Act, effective July 1, 1969; § 72-16A-14.30, N.M.S.A. 1953 (Supp. 1971) of the Gross Receipts and Compensating Tax Act, effective July 1, 1970; Gross Receipts and Compensating Tax Act Regulation 14-2(B)-2, omitting examples, effective September 22, 1967; Gross Receipts and Compensating Tax Act Regulation 3(J)-1, example (A), effective September 22, 1967; and Emergency School Tax Regulation 4.10-2, effective July 14, 1964. These statutes and regulations are quoted in Appendix A.

QUESTIONS PRESENTED

(1) Was the New Mexico Court of Appeals correct in determining that Petitioner's sales were sales of tangible personal property and was it in violation of § 1 of the Fourteenth Amendment to the United States Constitution to consider Petitioner's sales as sales of services?

(2) If Petitioner's sales were sales of tangible personal property, were Petitioner's gross receipts from the sale of this property to buyers outside New Mexico, when delivery is made outside New Mexico, exempt or deductible from taxes imposed by the New Mexico Emergency School Tax Act and New Mexico Gross Receipts and Compensating Tax Act because of Article I, § 8 of the United States Constitution?

SUMMARY OF ARGUMENT

The New Mexico Court of Appeals, because of its decision that Petitioner was selling tangible personal property rather than performing services, has raised an issue concerning the taxability of receipts from "outshipments" of tangible personal property under Article I, § 58, of the United States Constitution. The lower court, in deciding that Petitioner was not performing services, misconstrued the intent of the New Mexico Legislature regarding the taxability of services performed for the United States government and certain non-profit organizations and also misconstrued the requirements of § 1 of the Fourteenth Amendment to the United States Constitution. The Bureau of Revenue does not contest the argument that receipts from "outshipments" of tangible personal property are exempt or deductible from the taxes at issue here under Article I, § 8, of the United States Constitution; however, we do argue that it is not necessary to reach that issue if Petitioner's receipts are determined to be receipts from performing services.

ARGUMENT

I

Petitioner's Gross Receipts Were From the Performance of Services in New Mexico and Were Subject to Emergency School Tax and Gross Receipts Tax. The Commissioner of Revenue's Decision Concerning This Matter Was Supported by Substantial Evidence, Reflected the Intent of the New Mexico Legislature and Was Not Contrary to the Requirements of § 1 of the Fourteenth Amendment of the United States Constitution.

In its first opinion, the Court of Appeals, in deciding that Evco was selling tangible personal property rather than performing services, stated:

> "... Clearly the purpose of the exemptions in the statutes was to exempt the United States, or any agency or instrumentality thereof, the State of New Mexico, or any subdivision thereof, non-profit schools, universities, hospitals, and religious or charitable organizations from the impact of the taxes in question. The adoption of the position taken by the Commission would result in the ultimate imposition of taxes, such as those here involved, upon the agencies and institutions which the Legislature clearly intended should be exempt therefrom, or result in the tax burden being shifted to other taxable customers of the taxpayer. Neither of these results would be consistent with the legislative intent. Shifting the tax burden would be inconsistent with the object of requiring a tax burden to fall with the uniformity and equality upon the class of persons sought to be taxed. See *New Mexico Electric Service Co.* v. *Jones,* 80 N.M. 724, 729, 472 P. 2d 987, 992 (Ct. App. 1970).

The exemption the lower court speaks of would, in the context of the case, have to be the exemption and deduction provided in § 72-16-5, N.M.S.A. 1953 of the Emergency School Tax Act and § 72-16A-14(G) and

(L), N.M.S.A. 1953 of the Gross Receipts and Compensating Tax Act. (Appendix A, *infra,* pp. 18, 19). These sections refer only to receipts from sales of "tangible personal property" and not to receipts from the performance of services. The result of the court's interpretation is to render the distinction between "property" and "services" made in both the Emergency School Tax Act and Gross Receipts and Compensating Tax Act surplusage or superfluous. This distinction is clearly and carefully drawn on both Acts.

In the Emergency School Tax Act, a specific section appears to impose tax on the type of activity which resulted in Evco's gross receipts that being a, ". . . service rendered [which] is of a professional, technical, or scientific nature . . . ." Section 72-16-4.9, N.M.S.A. 1953 (Appendix A, *infra,* p. 17). Although the Emergency School Tax Act did not refer to property which was transferred incidental to the performance of services, the regulations promulgated by the Bureau of Revenue to interpret that Act recognized that transfers of this type occurred in most transactions involving the performance of services and stated in part, ". . . Where the taxpayer must use tangible personal property in the performance of his service, he must compute his school tax under § 72-15-4.10 on the total receipts derived from the performance of the service and gross proceeds of sales of tangible personal property unless the industry of which he is a part has a common practice of billing material and labor separately." Emergency School Tax Regulation 4.10-2 (Appendix A, *infra,* p. 21).

The Gross Receipts and Compensating Tax Act, which became effective July 1, 1967, also specifically

separated the performance of services as a separate and distinct activity from the sale of property. It also indicated that the performance of services could include the transfer of property. In defining "service", the Act stated that it involved ". . . primarily the performance of a service as distinguished from selling property." Section 72-16A-3(J.), N.M.S.A. 1953 (Supp. 1967) (Appendix A, *infra,* p. 19). The Bureau of Revenue, by regulation, interpreted this to mean that receipts from performing services included ". . . amounts for sales of tangible personal property used in the performance of the service . . . ." Gross Receipts and Compensating Tax Act Regulation 14-2(B)-2 (Appendix A, *infra,* p. 20). See Gross Receipts and Compensating Tax Act Regulation 3(J)-1, example (A) (Appendix A, *infra,* p. 21).

With these regulations as a basis for interpretation, along with the facts that the taxpayer was engaged in business as a designer or creator of educational programs and engaged in the activities described in paragraph (9), subparagraphs (a), (h), (i), and (k) of the stipulation of facts (quoted in *Evco* v. *Jones,* 81 N.M. 724, 726, 727, 472 P. 2d 987, 989, 990 (Ct. App. 1970), it is apparent that there was substantial evidence to support the Commissioner's decision that Evco's receipts were from the performance of services.

The regulations of the Bureau of Revenue should be a reinforcing value to the Commissioner's decision. Compare *Fox* v. *Standard Oil Co. of New Jersey,* 294 U.S. 87, 96, 55 S. Ct. 333, 337, 79 L. Ed. 780 (1935), and Sutherland, *Statutory Construction,* § 6709, Vol. 3, 3rd Ed. (1943). In *Washington Times-Herald, Inc.* v. *District of Columbia,* 213 F. 2d 23 (D.C. Cir. 1954), the court found that the disregard by the Tax Court of a

finding of fact contrary to an implementing regulation regarding a distinction between services and tangible personal property was a reversible error.

The re-enactment by the New Mexico Legislature of the definition of "service" in 1969, § 72-16A-3(K), N.M.S.A. 1953 (Supp. 1971), indicates an intention on the part of the Legislature to agree with the prior regulations of the Bureau of Revenue. Compare *Commissioner of Internal Revenue* v. *Noel,* 380 U.S. 678, 682, 85 S.Ct. 1238, 14 L. Ed. 2d 159, 162, and Sutherland, *Statutory Construction, supra.*

The Bureau of Revenue contends that it is clear that the intent of the New Mexico Legislature was not to exempt or grant a deduction to sellers of services to the United States or its agencies or instrumentalities or to certain non-profit organizations when those sales involved the incidental transfer of tangible personal property. In *Bradbury & Stamm Construction Co.* v. *Bureau of Revenue,* 70 N.M. 226, 232, 233, 372 P. 2d 808, 813, 814 (1962), the New Mexico Supreme Court explained the reasons underlying the amendment to § 72-16-5 of the Emergency School Tax Act, contained in N.M. Laws of 1961, chapter 191, § 1, which excluded an exemption for sales of services to the State of New Mexico. The indications are clear that the Legislature intended to place a tax on the receipts of persons performing service for the United States and was aware that this tax was constitutionally acceptable because the legal incidence of the tax was on the person performing the service. See *Alabama* v. *King & Boozer,* 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3, 140 A.L.R. 615 (1941), and *James* v. *Dravo Contracting Company,* 302 U.S. 134, 58 S. Ct. 208, 82 L. Ed. 155, 114 A.L.R. 318 (1937). Both the Emergency School Tax Act and

Gross Receipts and Compensating Tax Act impose the taxes at issue here on the *seller,* not on the buyer.

In 1969, the New Mexico Legislature enacted § 72-16A-14.12, N.M.S.A. 1953 (Supp. 1971) (Appendix A, *infra,* p. 20). That section provided for a deduction for the sale of certain services and required the buyer to ". . . make initial use of the *product of the service* outside New Mexico." (emphasis supplied) This statute is another indication of the recognition of the New Mexico Legislature that performance of services is accompanied by the transfer of tangible personal property. Another, similar indication is found in § 72-16A-14.30, N.M.S.A. 1953 (Supp. 1971) (Appendix A, *infra,* p. 20), which became effective July 1, 1970.

The fact that other jurisdictions have determined that the production and transfer of items similar to the tangible personal property, in the form of "camera-ready copies", at issue here should be considered in view of the absence in those jurisdictions of a broad tax on services such as New Mexico has. In each of the cases relied on by the court in *Evco* v. *Jones,* 81 N.M. 724, 472 P.2d 987 (Ct. App. 1970), for the proposition that the receipts at issue here were from the sale of tangible personal property it should be noted that in order for the transaction in issue to be taxable it was necessary that it be classified as a transfer of property rather than the performance of a service. See *District of Columbia* v. *Norwood Studios, Inc.,* 118 U.S. App. D.C. 358, 336 F.2d 746 (1964); *Larey* v. *Duggan-Allen, Inc.,* 244 Ark. 908, 428 S.W.2d 71 (1968); *Albers* v. *State Board of Equalization,* 237 Cal.App.2d 494, 47 Cal. Rptr. 69 (1965), cert. denied, 383 U.S. 960, 86 S.Ct. 1226, 16 L.Ed.2d 302 (1966);

People v. *Grazer,* 138 Cal.App. 2d 274, 291 P.2d 957 (1965); *Green* v. *Sgurousky,* 133 So.2d 663 (Fla.Ct. App. 1961); *Community Telecasting Service* v. *Johnson,* 220 A.2d 500 (Me. 1966); *Mississippi State Tax Commission* v. *Hinton,* 218 So.2d 740 (Miss. 1969); *Hillman Periodicals, Inc.* v. *Gerosa,* 285 App.Div. 441, 137 N.Y.S.2d 863, aff'd, 308 N.Y. 982, 127 N.E.2d 842 (1955); and *People ex rel. Walker Engraving Corporation* v. *Groves,* 243 App.Div. 652, 276 N.Y.S. 674, aff'd, 268 N.Y. 648, 198 N.E. 539 (1935). It would seem to be a reasonable assumption that the agency administering the tax statutes in the above cited cases would tend toward extension of the transactions subject to tax by extension into transactions which might otherwise be considered performance of services. The stage or level in the economic process at which the tax is imposed effect the amount of tax extracted. See Hellenstin, J. R., *The Scope of the Taxable Sale Under Sales and Use Tax Acts: Sales or Distinguished from Services,* 11 Tax Law Rev. 261, 273 and 274 (1956). It is also likely that the court deciding the above cited cases gave some weight to administrative determinations regarding the nature of the transactions at issue, whether or not it is explicitly indicated in their opinions.

Department of Treasury of State of Indiana v. *Ingram-Richardson Manufacturing Company of Indiana,* 313 U.S. 252, 61 S.Ct. 866, 85 L.Ed. 13113 (1941), is a case presenting issues similar to those present here. Indiana's Gross Income Tax Law imposed a tax on gross receipts from performing services in Indiana. The taxpayer enameled stove and refrigerator parts belonging to its out-of-state customers at its factory in Indiana. Indiana imposed its tax on this activity as gross receipts from performing services and its

position was sustained even though the enameled parts were sent outside Indiana. The court stated:

> "... Here, on the contrary, the entire service was in aid of the enameling business conducted within the state. The transportation of the metal parts to and from Indiana were but incident to that intrastate business, as was the circulation of appellant's magazine in States other than the taxing State in the Western Livestock Case, *supra*." [*Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944 (1938)]

It seems apparent that the delivery of the enameled parts to out-of-state customers was essential to the contract between the taxpayer and its customers and that, to quote the court below in this case, "Their non-production, non-use or destruction would apparently defeat the ultimate objective of the entire contract under which they were created and furnished to the purchaser." However, it was determined that such sales were sales of services.

The reasoning of the Court of Appeals regarding the shifting of the tax burden and the possible result that the tax burden would not fall with uniformity and equality upon the class of persons sought to be taxed, if the activity engaged in by the taxpayer was considered a service, relies on an erroneous construction of the requirement of the equal protection provision of § 1, of the Fourteenth Amendment to the United States Constitution. The case relied on by the lower court for support of its reasoning is *New Mexico Electric Service Company* v. *Jones*, 80 N.M. 791, 461 P.2d 924 (Ct. App. 1969). See *Evco* v. *Jones*, 81 N.M. 724, 729, 472 P.2d 987, 992 (Ct. App. 1970). In the *New Mexico Electric Service Company* case, the taxpayer

argued that the equal protection provisions of the United States Constitution and the New Mexico Constitution (Article II, § 18) were violated if a repealed deduction for federal income tax from "base income", as defined in the New Mexico Income Tax Act, was not allowed to fiscal year taxpayers whose taxable years included a portion of the year prior to the date the deduction was repealed. The Court of Appeals stated that they did not express or suggest opinion on that argument; however, in their opinion, the court explained that the relevant statutory provision accomplished the required equity and uniformity in the imposition of the tax.

There is no factual support that Evco would have been unable to "pass on" the gross receipts tax imposed on it to its buyers, regardless of who these buyers were. The incidence of the tax was clearly upon Evco, not buyers from Evco. There was no showing that Evco was treated differently from the broad class of persons providing services. A tax on Evco's services performed in New Mexico would not infringe on its rights under § 1 of the Fourteenth Amendment to the United States Constitution. Compare *Atlantic Coast Line R. Co.* v. *Doughton,* 262 U.S. 413, 43 S.Ct. 620, 67 L.Ed. 1051 (1923), and *Bowman* v. *Continental Oil Co.,* 256 U.S. 642, 41 S.Ct. 606, 65 L.Ed. 1139 (1921).

In considering this matter, the Bureau of Revenue wishes to point to a statement of Mr. Justice Jackson in *Norton* v. *Department of Revenue,* 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed. 517 (1951), as particularly applicable in this case. The statement follows:

> "Of course, in constitutional cases, we have power to examine the whole record to arrive at independ-

> ent judgment as to whether constitional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence." (340 U.S. 534, 538, 95 L.Ed. 517, 521).

The Court of Appeals considered the question of whether the activity engaged in by Evco resulted in the performance of services or the sale of property, as a question of law. It has been argued that this question was decided on erroneous grounds; however, the Bureau of Revenue also contends that this question was not a question of law but a question of fact. The Commissioner of Revenue had substantial evidence before him to support his decision that the activity engaged in by Evco was the performance of a service. If examination of the whole record in this case is made, it becomes apparent that the Court of Appeals' decision should be reversed and the Commissioner's decision reinstated. Such a result would not invade any of Evco's constitutional rights.

II

If Petitioner's Gross Receipts Were From Sales of Tangible Personal Property to Customers Outside the State of New Mexico, Where Delivery Is Made Outside the State of New Mexico, These Receipts Are Exempt From New Mexico Emergency School Tax and New Mexico Gross Receipts Tax as Sales in Interstate Commerce.

If Evco's gross receipts are determined to have been receipts from selling tangible personal property rather than performing services, the Bureau of Revenue is in agreement with the argument presented by Evco in its brief on the merits. This position has been maintained by the Bureau of Revenue before the New Mexico Court of Appeals in its brief in support of its motion for rehearing to the Court of Appeals, its petition to

the New Mexico Supreme Court for writ of certiorari to the Court of Appeals (Appendix B, pp. A19 to A23, of the Petition for Writ of Certiorari filed herein), and in oral argument before the Court of Appeals upon rehearing after remand by the court, see *Evco* v. *Jones,* 83 N.M. 110, 488 P.2d 1214 (Ct. App. 1971). The Bureau of Revenue, as has previously been argued, takes the position that if the taxes at issue were imposed on Evco's receipts from performing services, they would have been subject to tax. See *Western Livestock* v. *Bureau of Revenue,* 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944 (1938), and *Department of Treasury of State of Indiana* v. *Ingram-Richardson Manufacturing Company of Indiana,* 313 U.S. 252, 61 S.Ct. 866, 85 L.Ed. 1313 (1941). However, if Evco's receipts were from selling tangible personal property to customers outside New Mexico and delivery of this property was made outside New Mexico, then it is the position of the Bureau that these receipts may not be taxed because to do so would place an unconstitutional burden on interstate commerce. See *J. P. Adams Manufacturing Co.* v. *Stover,* 304 U.S. 307, 58 S.Ct. 913, 82 L.Ed. 1365 (1938); *Freeman* v. *Hewitt,* 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265 (1946); and *Gwin, White & Prince* v. *Henneford,* 305 U.S. 434, 59 S.Ct. 325, 83 L.Ed. 272 (1939).

The Court of Appeals in its second opinion in this matter stated:

> "We fail to understand how a tax on this aspect of interstate commerce can be constitutionally fair and valid if the incidents arise out of a contract for services, but constitutionally unfair and invalid when these same incidents arise out of a contract of sale." *Evco* v. *Jones,* 83 N.M. 110, 488 P.2d 1214, 1216 (Ct. App. 1971).

Although there is case law considering this distinction and presenting a variety of reasons for the distinction, the Bureau of Revenue thinks that the most probable reason the distinction is made and preference to the destination state given, is the recognition that substantially all states with gross receipts or sales tax have enacted compensating or use taxes to protect local merchants from competitive disadvantage. It appears to be clear that a buyer's state or destination state can impose a tax on the use or consumption of property after it comes to rest following interstate movement. This being so, taxation of the property by the seller's state or origin state threatens interstate commerce with cumulative economic burden which local sellers do not bear. Apportionment by the seller's state does not alleviate the problem, because the state of destination will tax the full value of the property. The problem could be alleviated if the destination state allowed a credit against compensating or use tax for sales, gross receipts, sales, compensating, or similar tax levied by another state and paid to that state, as does the New Mexico Gross Receipts and Compensating Tax Act, § 72-16A-16, N.M.S.A. 1953 (Supp. 1971). However, absent that type of credit provision, a cumulative burden would be possible, if not probable. See generally Lockhart, W. B., *The Sales Tax in Interstate Commerce,* 52 Harv. L.Rev. 617, 627 (1939).

It is possible that the Court of Appeals was considering the emergency school tax and gross receipts tax at issue here to be in the nature of a tax on manufacturing similar to the tax levied by the City of St. Louis in *American Manufacturing Company* v. *City of St. Louis,* 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084 (1919). That case decided that a tax on manufacturing which was *measured* by sales of goods which were first stored

and then sold to persons both inside and outside the city did not amount to a regulation of interstate commerce.

The New Mexico taxes at issue here were not imposed on the activity of manufacturing. Compare *Crown Zellerbach Corporation* v. *State,* 53 Wash.2d 813, 328 P.2d 884 (1958), appeal dismissed, 359 U.S. 531. The Emergency School Tax Act explicitly excluded the gross receipts of manufacturers. See § 72-16-4.3(C), N.M.S.A. 1953 (Appendix A, *infra,* p. 17). The Gross Receipts and Compensating Tax Act does not impose a tax on manufacturers but rather on receipts from ". . . selling property in New Mexico, from leasing property employed in New Mexico, and from performing services in New Mexico." Section 72-16A-3(E), N.M.S.A. 1953 (Supp. 1967) (Appendix A, *infra,* p. 18). Manufacturers would be taxed on their receipts from selling property in New Mexico to the extent no exemption or deduction applied. The definition of "manufacturing" contained in the Act definitely contemplates the sale of property rather than the performance of services. See § 72-16A-3(F), N.M.S.A. 1953 (Supp. 1967) (Appendix A, *infra,* p. 19).

In conclusion, the Bureau of Revenue wishes to make reference to the Court of Appeals' comment regarding G.R. Regulation 14.10-2, effective December 5, 1969. That regulation stated in part:

> "Receipts of New Mexico sellers from sales of property to non-residents of New Mexico where delivery is made out-of-state by seller's vehicle, U.S. Mail, or common carrier are receipts from transactions in interstate commerce and such receipts may be deducted from the gross receipts of the seller."

In Appendix B to its brief in support of its motion for rehearing to the Court of Appeals, the Bureau presented representative statutes, regulations, and rulings from states imposing sales or gross receipts taxes which take the position reflected in G.R. Regulation 14.10-2. On the basis of this information, the Bureau asserts that quite a number of other states appear to have considered the position asserted by the Bureau under this point to be correct.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Writ of Certiorari which has been granted herein specifically reverse the Court of Appeals of the State of New Mexico, and that this Court specifically direct that final judgment be entered pursuant to the decision of this court.

Respectfully submitted,

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APPENDIX A

Constitution of the United States, Amendment XIV—Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 72-16-14.3, Subparagraph C, N.M.S.A. 1953 of the Emergency School Tax Act [N.M. Laws of 1963, Chapter 325, § 2]—

C. The gross receipts of the business of every person engaging or continuing in the business of manufacturing, smelting, refining, reducing, processing, compounding, fabricating, packing, preserving, distilling, preparing for sale or commercial use, or the making of wares, commodities or material products other than the natural resource products set out immediately above in this section, and including the generation of electricity, shall be specifically excluded from taxation under this section; Provided that all such persons shall be required to obtain a license from the bureau of revenue in the same manner as other persons subject to taxation under the Emergency School Tax Act [72-16-2 to 72-16-47], and for the purpose of proving exemptions under this section shall, if required by the bureau of revenue, make reports on forms prescribed by the bureau showing the gross receipts of such business and the persons to whom such products were sold.

Section 72-16-4.9, N.M.S.A. 1953 of the Emergency School Tax Act [N.M. Laws of 1963, Chapter 325, § 7]—

The tax shall be computed at an amount equal to three per cent [3%] of the gross receipts of any person engaging or continuing in the practice of any profession, or of any business in which the service rendered is of a professional, technical or scientific nature and is paid for on a fee basis, or by a consideration in the nature of a retainer.

Section 72-16-5, N.M.S.A. 1953 of the Emergency School Tax Act [N.M. Laws of 1963, Chapter 239, § 1 and N.M. Laws of 1966, Chapter 59, § 1]—

None of the taxes levied by the Emergency School Tax Act [72-16-2 to 72-16-47], as amended, shall be construed to apply to:

A. Sales of tangible personal property, other than metalliferous mineral ores, whether refined or unrefined, made to the government of the United States, its departments or agencies;

B. Sales of tangible personal property, other than metalliferous mineral ores, whether refined or unrefined, made to the state of New Mxico or any of its political subdivisions; and

C. Sales of tangible personal property, other than metalliferous mineral ores, whether refined or unrefined, made to nonprofit schools, colleges, hospitals, religious or charitable organizations in the conduct of their regular hospital, religious, charitable or nonprofit functions.

Section 72-16A-3, Subparagraph E of the Gross Receipts and Compensating Tax Act, Effective July 1, 1967—

E. "Gross receipts" means the total amount of money or the value of other consideration, received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico, and includes any type of time-price differential and receipts from sales of property handled on consignment but excludes cash discounts allowed and taken.

In an exchange in which the money or other consideration received does not represent the value of the property or service exchanged, "gross receipts" means the reasonable value of the property or service exchanged.

When the sale of property or service is made under any type of charge, conditional or time sales contract or the leasing of property is made under a leasing contract, the

seller or lessor may elect to treat all receipts under such contracts as gross receipts as and when the payments are actually received. If the seller or lessor transfers his interest in any such contract to a third person, he shall pay the gross receipts tax upon the full sale or leasing contract amount.

"Gross receipts," for the purposes of the business of buying, selling or promoting the purchase, sale or leasing, as factor, agent or broker, on a commission or fee basis, of any property, service, stock, bond or security, includes only the total commissions or fees derived from the business.

Section 72-16A-3, Subparagraph F, of the Gross Receipts and Compensating Tax Act, Effective July 1, 1967—

F. "Manufacturing" means combining or processing components or materials to increase their value for sale in the ordinary course of business but does not include contracting.

Section 72-16A-3, Subparagraph J, of the Gross Receipts and Compensating Tax Act, Effective July 1, 1967—

J. "Service" means all activities engaged in for other persons for a consideration, which activities involve primarily the performance of a service as distinguished from selling property. "Service" includes contracting and all materials employed in contracting are to be treated as part of the service. However, sales of materials that will be employed in contracting to persons engaged in contracting are sales of tangible personal property.

Section 72-16A-14, Subparagraph G of the Gross Receipts and Compensating Tax Act, Effective July 1, 1967—

G. Receipts from selling tangible personal property, other than nonfissionable metalliferous mineral ore, to the United States or any agency or instrumentality thereof or the state of New Mexico or any political subdivision thereof may be deducted from gross receipts.

Where the taxpayer must use tangible personal property in the performance of his service, he must compute his school tax under Section 72-16-4.10 on the total receipts derived from the performance of the service and gross proceeds of sales of tangible personal property unless the industry of which he is a part has a common practice of billing material and labor separately. Where separate billing of material and labor is the trade practice, the taxpayer shall report gross receipts from labor under Section 72-16-4.10, N.M.S.A., 1953 Compilation, and gross receipts from materials under Section 72-16-4.5, N.M.S.A., 1953 Compilation. In the latter situation the taxpayer may execute a resale certificate under Section 72-16-4, N.M.S.A., 1953 Compilation, for the tangible personal property which he purchases and includes in the billing as materials.